57821-9 57821-9

No. 57821-9-I 813566

Court of Appeals, Division I, of the State of Washington

ORIGINAL

BIANCA FAUST, individually and as guardian of GARY C. FAUST,a minor, and BIANCA CELESTINE MELE, BRYAN MELE, BEVERLY MELE, and ALBERT MELE, BRYAN MELE, BEVERLY MELE and ALBERT MELE,

Respondent/Cross-Appellants,

v.

MARK ALBERTSON, as Personal Administrator for the ESTATE OF HAWKEYE KINCAID, deceased, Respondent, and BELLINGHAM LODGE #493, LOYAL ORDER OF MOOSE, INC., and ALEXIS CHAPMAN,

Defendants-Appellants,

MOOSE INTERNATIONAL, INC., and JOHN DOES (1-10),

Respondents.

BRIEF OF DEFENDANTS-APPELLANTS BELLINGHAM LODGE #493, LOYAL ORDER OF MOOSE, INC. AND ALEXIS CHAPMAN

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases: **Page**

Statutes and Rules: **Page**

Miscellaneous: **Page**

PRELIMINARY STATEMENT

Defendants appeal from a judgment for plaintiffs and denial of post-trial relief arising out of a jury trial in Whatcom County. Three plaintiffs were injured when their vehicle was struck by a van driven by Hawkeye Kincaid, who had been drinking alcohol. A fourth plaintiff alleged a loss of consortium. Plaintiffs contend that Kincaid had been over-served by defendants Bellingham Lodge #493, Loyal Order of Moose, Inc. and its bartender Alexis Chapman.

Both before and after verdict, defendants sought judgment as a matter of law based on plaintiffs' failure to offer evidence that Kincaid was under the influence of alcohol at the time he was served. The trial court denied the motions. Defendants challenge the rulings.

Defendants also challenge court rulings: (1) allowing plaintiffs to use the deposition of an absent witness who offered them no support so that they could impeach him with an *ex parte* declaration, (2) allowing plaintiffs to question a defense witness in the jury's presence about whether he had drunk alcohol before testifying, (3) permitting plaintiffs to suggest a conspiracy to lie among defense witnesses by twisting lodge traditions and by asking a defense witness about a discovery dispute, and (4) incorrectly instructing the jury about the type of proof needed in over-service cases.

ASSIGNMENTS OF ERROR

1. The court erred by entering judgment for plaintiffs and by denying defendants' motion for judgment notwithstanding the verdict or new trial based on the insufficiency of evidence as to the alleged over-service of alcohol to Kincaid. *De novo* review.

2. The court abused its discretion by allowing plaintiffs to use the deposition and *ex parte* declaration of Ron Beers. Abuse of discretion review.

3. The court abused its discretion by allowing plaintiffs to question defense witness Mac Pope in the jury's presence about drinking prior to testifying. Abuse of discretion review.

4. The court abused its discretion by allowing plaintiffs to offer inadmissible evidence unfairly impugning defendants' integrity and credibility. Abuse of discretion review.

5. The trial court erred by giving the court's instruction 13 and by denying defendants' instruction 36. *De novo* review.

6. The court erred by giving the court's instruction 3 and by denying defendants' instruction 39. *De novo* review.

ISSUES PERTAINING TO ASSIGNMENT OF ERRORS

1. Whether plaintiffs offered legally admissible evidence that Kincaid appeared to be intoxicated at the time of service [Assignment of Error (AE) 1]?

2. Whether plaintiffs unfairly introduced the evidence deposition of Ron Beers for the primary purpose of impeaching his testimony through an *ex parte* inadmissible declaration (AE 2)?

3. Whether the court's limiting instruction about the Beers' declaration erroneously misled the jury into believing that the declaration may be considered as substantive evidence (AE 2)?

4. Whether the court abused its discretion by not *sua sponte* requiring a hearing outside the presence of the jury to determine whether Mack Pope was intoxicated and so incompetent to testify (AE 3)?

5. Whether plaintiffs' questioning of defendants' witnesses about the lodge's traditions and ceremonies were unfair attempts to foment prejudice against defendant and its members by portraying them as conspiring and lying to the jury to protect the lodge (AE 4)?

6. Whether the court unfairly allowed plaintiffs to question a defense witness in the jury's presence about a pre-trial discovery dispute over a membership list (AE 4)?

7. Whether the court erred by failing to instruct the jury that evidence of blood alcohol content may not be used to prove an over-service claim (AE 5)?

8. Whether the court erred by not modifying the standard WPI circumstantial evidence instruction to account for the legal requirement that direct observational evidence is needed to prove a claim of over-service of alcohol (AE 6)?

STATEMENT OF FACTS

Plaintiffs are Bianca Faust, individually and as administrator of her son Gary Christopher, her adult daughter Bianca Mele, and Mele's husband Bryan (CP 907-08). Defendants-appellants are Bellingham Moose Lodge #493 and its bartender Alexis Chapman (*Id.*). Defendant Estate of Hawkeye Kincaid admitted liability and did not participate at trial (RP 5-6: 9/29/05). Defendant Moose International, Inc. (International) was granted judgment at the close of all evidence (RP 1855-56; CP 19-20).

On April 21, 2000, before 7:46 p.m., Kincaid's southbound van heading toward Bellingham crossed a center line just south of Ferndale and struck plaintiffs' northbound vehicle (RP 87-88, 168-69, 1373-74). Driver Bianca Faust suffered a broken kneecap and other injuries (RP 1706 at 9-10). Her daughter Bianca broke both wrists and a femur and

sustained a knee injury and head lacerations (CP 1266 at 6-8; RP 96). Christopher was rendered a paraplegic with inability to control his bowel and urinary functions (RP 1708 at 13-15). Kincaid bled to death (RP 190). A 40-ounce, partially empty liquor bottle was found on Kincaid's front floorboard (RP 1378-79).

Plaintiffs alleged that the lodge and Chapman (collectively defendants) over-served alcohol to Kincaid and that the lodge and International negligently supervised Chapman (CP 1692, 1693-94, 1697-98). All denied the allegations (CP 1674-81).

ISSUE ON APPEAL: SUFFICIENCY OF EVIDENCE THAT KINCAID WAS APPARENTLY INTOXICATED AT THE TIME OF SERVICE

Plaintiffs' toxicologist Richard Saferstein testified that Kincaid's blood alcohol content (BAC) at 8:49 p.m. (one hour after the accident) was 0.14% (RP 229). Kincaid's BAC at the time of autopsy was 0.09% (RP 200). Because Kincaid received large amounts of fluids to replace lost blood, Saferstein opined that Kincaid's BAC at the time of accident was 0.32% (RP 233). After assuming that Kincaid consistently drank seven beers per hour from 4:45 p.m. until approximately 7:30 p.m., Saferstein also opined that Kincaid's BAC was 0.26% at the time of the accident (RP 229-36, 252-53). Medical examiner Gary Goldfogel testified

that Kincaid's stomach contained about 1.5 liters of fluid strongly smelling of alcohol (RP 201-02).

Saferstein stated that the complete absorption of alcohol into the bloodstream takes about one hour (RP 227). He stated that frequent alcohol users may not show the same signs of intoxication exhibited by normal persons (RP 244).

No witness testified for plaintiffs to having observed Kincaid appear to be intoxicated. Plaintiffs called bartender Chapman, who testified that she had a loving relationship with Kincaid (RP 385). He lived with her, and she supported him (RP 385-88). Chapman was an experienced bartender who started working at the lodge in January 2000 (RP 621). Chapman joined the lodge, and a month later Kincaid joined (RP 392, 394-95). Chapman described Kincaid as a "[m]oderate to heavy" drinker (RP 396). On the day of the accident, Kincaid arrived at the lodge about 4:30 p.m. and sat at the bar with other members (RP 431-32, 434). Chapman served him two bottles of beer (RP 444). Chapman never saw Kincaid intoxicated, whether stumbling, slurring words, or acting drunk (RP 396-97). Kincaid left the lodge around 6:00 p.m. because he did not like the dinner menu (RP 438-39, 442, 1738). Chapman stated that Kincaid was not intoxicated when he left (RP 1728). According to one of plaintiffs' investigators, Chapman told him that

Kincaid left at 7:00 p.m. (RP 370). Consistent with her trial testimony, Chapman gave a written statement to another plaintiffs' investigator that Kincaid left at 6:00 p.m. (RP 1733).

Plaintiffs called lodge member John Liebrant, who had sat at the bar with Kincaid and others (RP 537-41). Liebrant saw Kincaid drink a beer (RP 541). He saw no evidence that Kincaid was under the influence of alcohol (RP 560). Liebrant and Kincaid left the lodge at the same time, and Kincaid appeared "totally sober" (*Id.*). Plaintiffs also called lodge administrator Frank Rose, who testified that he spoke to Kincaid before leaving the bar around 5:30 p.m. (RP 632). Kincaid was drinking a beer (RP 631-32). Rose saw no sign of slurred speech, unsteady balance, or behaviors nearing intoxication (RP 649-50).

Plaintiffs also offered deposition testimony from member Ron Beers, who had moved to Oregon (RP 315). Beers testified that he could not recall being at the lodge on the day of the accident (CP 962 at 16; CP 969 at 43). Beers testified that if he was present and saw Kincaid, Beers had no recollection of when Kincaid left (CP 969 at 43). Beers had no recollection of ever seeing anyone, including Kincaid, intoxicated at the lodge while Chapman was bartending (CP 965 at 28; CP 966 at 30-33; CP 968 at 40-41).

Plaintiffs also offered testimony from two witnesses who had not seen Kincaid. His daughter Rainy Kincaid testified that Kincaid was a "pretty heavy drinker" (RP 280). According to Rainy, during funeral preparations Chapman said that she and Kincaid had been arguing and that Chapman told him to leave (RP 265-66). Plaintiffs asked:

> Q. And did she describe [Kincaid's] condition when she told him to leave?
>
> A. Yeah, she knew that he was tipsy, that he shouldn't be behind the wheel.

(RP 266). Rainy testified that following the funeral, a second conversation occurred. It was "[p]retty much along the same lines" (RP 267). Plaintiffs asked:

> Q. And the second time that she talked to you, did she again indicate what his condition was when he left the Moose Lodge?
>
> * * *
>
> A. That he had been drinking for quite awhile.

(RP 267-68). According to Rainy, Chapman stated that Kincaid was drunk (RP 267). Chapman denied that the conversations with Rainy occurred (RP 1727).

Plaintiffs also offered testimony from Lisa Johnston, a former bouncer at the Pioneer bar in Ferndale (RP 331). Johnston described Kincaid as a "heavy" drinker (RP 337-38). According to Johnston,

Chapman said that "[Kincaid] was sitting at the bar and he was being obnoxious and that he was drunk, and she cut him off and he got mad" (RP 336). Kincaid then left (*Id.*). Chapman was mad that she had to stop serving Kincaid (RP 337). Chapman denied that the conversation occurred (RP 1727-28).

During defendants' case, Eleanor Rose testified that she saw Kincaid at the lodge but saw "nothing out of the ordinary" (RP 1275). She saw no evidence that he was intoxicated (*Id.*). Larry Rayborn testified that he sat with Kincaid and others at the bar (RP 1292). Kincaid did not appear intoxicated (RP 1298). Rayborn believed that Kincaid left the lodge around 6:00 p.m. when Rayborn moved from the bar to eat dinner (RP 1294-95, 1311). Ray Anderson testified that he briefly spoke to Kincaid at the bar (RP 1317). Anderson left the lodge after 5:50 p.m., and when Anderson left Kincaid was gone (RP 1319-20). Anderson stated that Kincaid "acted perfectly normal to me" and showed no signs of intoxication (RP 1321).

Defendants moved for directed verdict at the end of the evidence (RP 1834). Although recognizing that "there isn't very much" observational evidence, the court found enough to deny the motion (RP 1840). It also denied defendants' post-trial motion for judgment (CP 839-40). The court stated that "[w]ithout the statements of bartender Chapman

[as testified by Rainy Kincaid and Lisa Johnston], Defendants' motion would be granted . . . " (CP 840). The court also denied defendants' post-trial motion as to negligent hiring/supervision for the same reason (*Id.*).

ISSUE ON APPEAL: THE USE OF RON BEERS' DEPOSITION AND *EX PARTE* DECLARATION SUBSTANTIVELY AND FOR IMPEACHMENT

The deposition of lodge member Ron Beers was taken on April 22, 2004 (CP 958). In late March or April 2003, plaintiffs' investigator Larry Langdale conducted a surprise *ex parte* interview of him (CP 961 at 10; RP 920-22, 924). Plaintiffs offered no evidence that defendants had been notified of the interview. Langdale tape-recorded the conversation and prepared a written declaration presented to Beers on April 10, 2003 for signature (RP 921-24). Beers stated that Langdale told him, "It's typed. Sign it" (CP 962 at 14). Beers testified that he neither read the declaration nor received copies of it or a transcript of the tape (CP 962 at 15; CP 969 at 44). After Langdale returned unannounced to present the unsigned declaration, he included a handwritten addendum stating, "I believe Hawkeye Kincaid left the Moose Club between 7:00-7:30 pm on April 21, 2000. I was there that night" (CP 961 at 12-13; CP 962 at 16-17; CP 974). In the initial interview, Beers could not recall being at the lodge on the date of the accident (RP 926). According to Langdale, Beers remembered it after talking to Langdale on April 10 (*Id.*).

In the declaration, Beers stated that he had seen Kincaid drink at the lodge on many occasions (CP 973). On most times, Chapman tended bar (*Id.*). The declaration stated that Beers saw Kincaid intoxicated a couple times, which Beers detected "by the way he was talking, he would get belligerent, and with his language" (*Id.*). The declaration states that members were concerned about the lodge's license and had discussed that "Alexis Chapman was continuing to serve alcohol to Hawkeye Kincaid when it was obvious that he was intoxicated" (CP 973-74).

Defendants moved *in limine* to strike the declaration as hearsay and as failing to meet legal formalities (RP 14-20; CP 1267-72). The court reserved its ruling (RP 18-19). At trial, defendants stated that plaintiffs were only using Beers' deposition to broadcast the inadmissible declaration:

> They don't actually want his deposition. They want the written statement. I mean, that's -- let's be fair, because in his deposition, he didn't say anything that was helpful to them. What they want is the written statement.

(RP 316). Defendants moved to strike the deposition entirely (RP 498).

The court allowed plaintiffs to read the deposition (RP 496). The court did not let them play the tape recording because defendants could not cross-examine Beers on it (RP 498-99). The court allowed the declaration to be read for impeachment purposes because it was discussed during the deposition (RP 500-01).

The court agreed to give a limiting instruction before reading the declaration (RP 496). Defendants tendered a limiting instruction stating in pertinent part:

> You may not consider the contents of the written statement as proof of the truth of the matters stated in the statement. If you give any consideration to the written statement, you may only consider it in deciding what weight or credibility to give to Mr. Beers' deposition testimony and for no other purpose.

(CP 975). The court deleted the first sentence (RP 496). The court itself read the Beers' declaration to the jury (RP 907-09). When the court finished reading, it stated: ". . . [T]hat's the gist of that deposition. You may consider that as the testimony of Mr. Beers . . ." (RP 909). Over defendants' objection the court gave the jury both the deposition and declaration for use in jury deliberations (RP 498).

In denying post-trial relief, the court stated that the declaration was admitted for impeachment, that the Beers' testimony had limited value, and that the use of the declaration was proper (CP 841).

ISSUE ON APPEAL: THE QUESTIONING OF MAC POPE ABOUT ALLEGED DRINKING BEFORE TESTIFYING

Defendants' theory was that if Kincaid was intoxicated, he became so after leaving the lodge around 6:00 p.m. Defense witness Mac Pope, who worked in Ferndale, testified that he unexpectedly saw his friend Robert Zoerb at about 6:15 p.m. (RP 1238-39). The two walked to a

nearby Ferndale bowling alley where Pope saw Kincaid with a 16-ounce beer (RP 1240-41, 1252). Pope left the bowling alley between 7:15-7:30 p.m., at which time Kincaid was still there (RP 1242). Zoerb also testified to seeing Kincaid at the bowling alley around 7:30 p.m. (RP 1666). The accident occurred around 7:46 p.m. south of Ferndale as Kincaid headed back toward Bellingham (RP 168-69, 1374). The bowling alley was about a 14-17 minute car ride from the lodge (RP 919-20, 1663-64). The bowling alley was a minute or two from the accident scene (RP 920).

Pope suffered from alcohol problems, and the court barred plaintiffs from asking Pope about his treatment (RP 1231-32). Following redirect examination, plaintiffs asked permission to question Pope about alleged drinking that day (RP 1263). Defendants objected to the questions as being without any factual basis (CP 845-48). The court allowed questioning (RP 1263). The court believed that it had smelled alcohol on Pope's breath "when [Pope] sat down," and it suggested that two jurors could do so (RP 1355).

On re-cross, plaintiffs' attorney stated in the jury's presence that "[i]t seems like there's alcohol on your breath," and he asked Pope whether Pope drank that day (RP 1263). Pope responded that he last drank before 9:00 p.m. on the prior evening (*Id.*). Following Pope's testimony, when the issue was again discussed at sidebar, the court stated:

> . . . that's up to the jury to judge his credibility. When he was asked if he was drinking, and he said no, if they can smell alcohol, they'll know.

(RP 1355). During closing argument, plaintiffs told the jury:

> I'm pretty confident that I'm not the only person in this courtroom that detected alcohol on Mac Pope's breath at 9:00 in the morning . . .

(RP 1885-86). The court refused to strike the comments because Pope was questioned on the subject (RP 1894).

In denying post-trial relief, the court stated that Pope's credibility was in issue (CP 840). It viewed the issue of Pope's credibility to concern "his ability to relate accurately at trial his recollections" (*Id.*). It ruled because Pope had been impeached with other questions and that the questions about drinking were "cumulative to that" (*Id.*). The court considered Pope's testimony to play a "minor role" such that the questioning was not unduly prejudicial (*Id.*).

ISSUE ON APPEAL: PLAINTIFFS' TRIAL TACTICS DIRECTED AGAINST THE INTEGRITY AND HONESTY OF THE LODGE

No witness testified to having observed Kincaid under the influence of alcohol. Plaintiffs argued that the lodge members had "moved quickly to stop the flow of information," covering themselves with a "shroud of silence" (RP 1871, 1877). Plaintiffs offered no conversation or documents establishing the so-called "pointed effort by

members" to hide the truth (RP 1869). Instead, plaintiffs pointed to the Moose "fraternal oath" to defend the Moose as a "sacred organization" (RP 1870).

In questioning their witness John Liebrant, plaintiffs asked:

> Q. (By Mr. DeZao) When you become a member, do you become a member at a ritualistic altar?

(RP 535). When the court overruled defendants' objection, plaintiffs further asked:

> Q. (By Mr. DeZao) Okay, and when you became a member, was there certain garb that everyone was wearing, certain attire, like robes and things of that nature?

(RP 536). Liebrant responded: "We don't wear white hoods, if that's what you're getting at" (RP 536). Plaintiffs continued to question Liebrant about robes and other attire (*Id.*).

Plaintiffs also used discovery issues to suggest a conspiracy to lie. During discovery, plaintiffs requested defendants' complete membership list (CP 1830-34). Defendants objected to the request as overly-broad and intrusive (CP 1818-23). After plaintiffs moved to compel production, a discovery judge (not the trial judge) granted partial relief (CP 1777-78). When a further dispute arose, plaintiffs moved to compel production and defendants objected (CP 1772-76, 1737-59). The same discovery judge ordered production of the list (CP 891). Defendants provided it, and

plaintiffs did not file a further motion to compel or move for a trial continuance to collect information from the listed members.

In violation of court rulings, plaintiffs asked John Liebrant whether defense counsel told him that he could refuse to speak to plaintiffs' counsel (RP 73: 9/26/05; RP 503-06, 543). The court struck the question and Liebrant's answer "[n]o" (RP 543). During questioning of lodge administrator Glenn Strode, plaintiffs asked, "[W]hy is it that you never provided [the membership list] to us when we requested it?" (RP 1653). The court allowed that question and additional questioning on the subject:

> Q. Did you ever voluntarily turn that over to the Plaintiffs ever?
>
> A. I did create a list, and I turned it over to [defense counsel] Mr. Fitzharris.
>
> * * *
>
> Q. (By Mr. DeZao) Was that pursuant to a court order where the court had to order it to be turned over?

(RP 1654). Plaintiffs also asked Strode if he had provided defense counsel with a list containing phone numbers (RP 1655). When Strode said that he did, plaintiffs' counsel told the jury that the list he received did not contain phone numbers (*Id.*). Plaintiffs did not show Strode the list. They also did not show him his discovery affidavit stating that a large percentage of member entries did not contain phone numbers (CP 1754-56).

During closing argument, plaintiffs stated:

> Now, having been met with such resistance trying to find out who was there that night, we finally formally requested a complete copy of their membership list, which you heard Mr. Strode saying it's easy. It's available. It's on a computer. They just print it off. Big surprise. They wouldn't turn it over. We only got it when the court ordered them to turn it over, and fortunately, we didn't get it --
>
> * * *
>
> Unfortunately, we didn't get it until just a couple months ago, five years after the accident.

(RP 1874-75). The court overruled defendants' objection to the argument (*Id.*).

ISSUE ON APPEAL: RULINGS ON JURY INSTRUCTIONS

Over objection, the court gave the standard WPI 1.03 instruction on circumstantial evidence (CP 1111; A.1). The court also gave an instruction stating:

> Whether a person was apparently intoxicated or not is to be determined by the person's appearance to others at the time the alcohol was served to the person. Neither evidence of the amount of alcohol consumed, nor evidence of the person's blood alcohol level, is sufficient by itself to establish that the person was served alcohol while apparently under the influence.

(CP 1121; A.1). Defendants tendered an instruction stating:

> You may not consider any evidence of Hawkeye Kincaid's blood alcohol content (BAC) in deciding whether Hawkeye Kincaid was apparently under the influence of alcohol when Alexis Chapman served him alcohol on April 21, 2000. This means you must disregard all evidence of Hawkeye Kincaid's blood alcohol content, including from

> medical records, the autopsy, and the opinions of Richard Saferstein and [defense expert] Michael Hlastala.

(CP 1138; A.1). Defendants also tendered a modified WPI 1.03 circumstantial evidence instruction stating in relevant part:

> ***Unless you are instructed otherwise,*** the law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case. One is not necessarily more or less valuable than the other.

(CP 1142; emphasis in original; A.2). Defendants contended that there was no direct evidence of over-service and that in absence of observational evidence, the court's instructions would be prejudicial (RP 1776-79, 1839-40, 1841). Contrary to law, it would allow the jury to rule against defendants based on circumstantial evidence arising out of Kincaid's blood tests (*Id.*). The court overruled defendants' objections (RP 1779, 1841).

The Verdict

On October 21, 2005, the jury returned a verdict against defendants and Kincaid (CP 1096-98). The jury awarded damages as follows: Bianca Faust — $2,130,422.52; Bianca Mele — $1,704,134.09; Gary Christopher Faust — $10,198,407.62; Bryan Mele — $10,000.00 (CP 1097-98). The jury allocated negligence as follows: Kincaid — 50%; Chapman — 15%; lodge — 35% (CP 1098). On November 4, 2005, the court entered judgment for plaintiffs (CP 1080-82).

On January 11, 2006, the court denied defendants' post-trial motion (CP 839-44).

ARGUMENT

I.

THE COURT ERRED BY ENTERING JUDGMENT FOR PLAINTIFFS AND BY DENYING DEFENDANTS' MOTIONS FOR JUDGMENT OR NEW TRIAL BASED ON THE INSUFFICIENCY OF EVIDENCE AS TO THE OVER-SERVICE OF ALCOHOL TO KINCAID.

Plaintiffs claim that defendants negligently over-served Kincaid and that the lodge negligently hired and supervised Chapman. Both before and after verdict, defendants moved for judgment. Alternatively, defendant requested a new trial. The court erred by denying those motions. Rulings on motions for directed verdict or for judgment notwithstanding the verdict [motions for judgment as a matter of law (JMOL)] are reviewed *de novo*. *Guijosa v. Wal-Mart Stores, Inc.*, 144 Wn. 2d 907, 32 P.3d 250, 254 (2001). Such motions should be granted when no competent and substantial evidence exists upon which a verdict can rest. 32 P.3d at 254. The denial of a motion for a new trial based upon the insufficiency of evidence is reviewed under the same standard. *Lockwood v. AC&S, Inc.*, 109 Wn. 2d 235, 243, 744 P.2d 605 (1987).

For purposes of defendants' motions, plaintiffs' two claims fold into one: over-service. If Chapman did not over-serve Kincaid, any

negligent hiring/supervision was inconsequential. To prove over-service, plaintiffs needed more than evidence that Kincaid was intoxicated at the time of the accident or when he left the lodge. Plaintiffs needed evidence that Kincaid was apparently under the influence of liquor at the time Chapman served him. *Barrett v. Lucky Seven Saloon, Inc.*, 152 Wn. 2d 259, 266-75, 96 P.3d 386, 389-93 (2004). This evidence must be direct, not circumstantial. A patron's condition must be visible to the server at the time of service, not just inferred from the circumstances. In *Purchase v. Meyer*, 108 Wn. 2d 220, 223, 737 P.2d 661, 663 (1987), the Supreme Court stated:

> Whether a person is "obviously intoxicated" [now apparently under the influence] or not needs to be judged by ***that person's appearance at the time the intoxicating liquor is furnished to the person.***

(emphasis supplied).

In *Christen v. Lee*, 113 Wn. 2d 479, 487, 780 P.2d 1307, 1311 (1989), the Supreme Court showed the strictness by which that standard should be applied. Plaintiff was shot in the head just after leaving a bar at closing time. Plaintiff's assailant had been drinking in the bar and left with plaintiff. A former bar employee testified that the assailant was intoxicated while at the bar "based solely on the amount of alcohol she saw him consume. . . ." 113 Wn. 2d at 289, 780 P.2d at 1312. No

evidence existed that he "actually appeared intoxicated to others around him." *Id.* The trial court granted summary judgment for the bar owner.

The Supreme Court upheld it because there was no direct evidence that the patron was served while appearing intoxicated:

> It is [the bar employee's] testimony that she thought [the assailant] was intoxicated, ***but her conclusion was based solely on the amount of alcohol she saw him consume, not on his actual appearance.*** In fact, [she] denied that [the assailant] appeared intoxicated. ***There is no evidence in the record to the effect that [the assailant] actually appeared intoxicated to others around him.*** We conclude, therefore, that there is insufficient evidence to raise an issue of fact as to whether [the assailant] was obviously intoxicated ***when served at the China Doll.***

113 Wn. 2d at 289-90, 780 P.2d at 1312 (emphasis supplied).

To defeat a JMOL motion, a plaintiff must do more than challenge the credibility of a defendant's case. A plaintiff must offer a "legally sufficient evidentiary basis" for the verdict. CR 50(a)(1). Here, plaintiff offered evidence of: (a) Kincaid's blood alcohol content (BAC) taken at death, from which his BAC at the time of the accident was inferred; (b) witnesses observing Kincaid at the lodge; and (c) witnesses who did not see Kincaid but who spoke to Chapman about him. This evidence did not establish a *prima facie* case for plaintiffs. Even assuming that Kincaid left the lodge at 7:30 p.m. and was intoxicated, defendants are still entitled to JMOL or a new trial.

Evidence of BAC is not a substitute for direct evidence of over-service. *Purchase,* 108 Wn. 2d at 226, 737 P.2d at 665; *Wilson v. Steinbach*, 98 Wn. 2d 434, 656 P.2d 1030, 1033 (1982); *Shelby v. Keck*, 85 Wn. 2d 911, 541 P.2d 365, 369 (1975). In *Purchase*, a minor was involved in an car accident after consuming more than two drinks. A breath test performed 3-1/2 to 4 hours after her leaving the restaurant showed that the minor had a 0.13% BAC. However, nothing "suggest[ed] that anyone who saw [the minor] at the El Torito believed that she appeared intoxicated." 108 Wn. 2d at 227, 737 P.2d at 663. The trial court denied El Torito's motion for summary judgment.

The Supreme Court reversed. Whether a person was intoxicated must be based upon ***"that person's appearance at the time the intoxicating liquor is furnished to the person."*** 108 Wn. 2d at 223, 737 P.2d at 663 (emphasis supplied). The Court rejected the alcohol testing evidence as "not competent evidence against El Torito." *Id.* at 226, 227, 737 P.2d at 665. It also rejected toxicological evidence like that presented here:

> The pharmacologist's affidavit purporting to relate Meyer's blood alcohol content to what it was when she was last served at the El Torito, and then from that to determine what he claims was the "obviousness" of her intoxication at the time of the last serving, is based entirely on the ***inadmissible alcohol breath testing results. It suffers from the same legal infirmities as the test results and is***

> ***speculative***. Thus there was ***no competent evidence in the record*** to establish that Meyer ***appeared "obviously intoxicated" to those around her when she was served at the El Torito***.

Id at 226-27, 737 P.2d at 665 (emphasis supplied).

Here, plaintiffs' BAC evidence was not competent to establish Kincaid's appearance when Chapman served him. An examination of plaintiffs' BAC evidence in light of *Purchase* explains the reason. Plaintiffs' expert Saferstein opined that Kincaid's BAC at the time of the accident (7:46 p.m.) was 0.26% (RP 229-36). Based on his assumption that Kincaid left the lodge at 7:30 p.m. after having drunk seven beers per hour since 4:45 p.m., Saferstein's analysis would indicate that Kincaid's BAC at the time of last service would have been 0.2254% (RP 235, 246). Saferstein testified that BAC rises at a steady rate, so under Saferstein's assumptions, Kincaid's rate of rise would have been 0.01436% per minute (RP 252). Given that rate, at 7:30 p.m. Kincaid's BAC would have been 0.2369%. If Kincaid was steadily drinking seven beers per hour, his last beer would have been served at 7:22 p.m. At that point, Kincaid's BAC would have been 0.2254%.

Even at that level, Kincaid's presumed BAC would not have guaranteed signs of intoxication. In *Purchase*, the Supreme Court accepted leading medical evidence that ***"the heavy drinker may still not appear intoxicated even with a blood alcohol level above .20%."*** 108

Wn. 2d at 225-26, 737 P.2d at 664-65 (emphasis supplied). Saferstein agreed that experienced drinkers may not show the signs of intoxication expected of a normal person (RP 243). And plaintiffs' witnesses testified that Kincaid was a very experienced drinker [Chapman: "[m]oderate to heavy" (RP 396); Johnston: "[h]eavy" (RP 337-38); Rainy Kincaid: "pretty heavy" (RP 280)]. Kincaid went drinking with his daughter Rainy to the Pioneer bar in Ferndale four or five times in six months (RP 270-71, 280). So the BAC evidence did not prove that Kincaid was apparently under the influence.

Neither did the evidence from witnesses who personally observed Kincaid. During plaintiffs' case, Chapman testified that she served Kincaid two bottles of beer and that he did not appear intoxicated (RP 396-97, 444). Kincaid did not stumble, slur his speech, or act drunk (RP 396-97). He was not intoxicated when he left the lodge (RP 1728). John Liebrant, seated with Kincaid, saw him drink a beer (RP 537-41). Liebrant saw no sign that Kincaid was under the influence of alcohol (RP 560). Liebrant last spoke to Kincaid when they left together, and Kincaid "looked at me like he was totally sober" (RP 560). Liebrant did not detect any untoward odor of alcohol on his breath (*Id*). Frank Rose spoke to Kincaid and saw no sign that Kincaid was even close to intoxication (RP 649). He found no evidence of slurred speech, unsteady balance or any

other characteristic of intoxication (RP 649-50). Plaintiffs admitted in closing argument that these witnesses were not helpful (RP 1870). Given their testimony, the admission is not surprising.

During defendants' case, Eleanor Rose testified that she was with Kincaid for 15-20 minutes and saw "nothing out of the ordinary" (RP 1275). Larry Rayborn was with Kincaid at the bar and saw no signs of intoxication (RP 1297-98). Rayborn watched Kincaid leave the lodge and saw nothing in Kincaid's walk suggesting that he was intoxicated (RP 1299). Ray Anderson chatted with Kincaid at the bar and testified that Kincaid "acted perfectly normal to me" (RP 1319-21). Anderson saw no signs of intoxication (RP 1321).

Ultimately, the court relied only on the testimony of Rainy Kincaid and Lisa Johnston, neither of whom was at the lodge. The court even stated: "[W]ithout the statements of the bartender Chapman [to Kincaid and Johnston], Defendants' motion would be granted . . ." (CP 840). Unfortunately, the court misconstrued the testimony. Rainy testified that Chapman spoke twice about Kincaid, but Chapman's statements did not establish Kincaid's condition at the critical time of service. In the first conversation, Chapman stated that she and Kincaid had argued and that Chapman "kicked him out or didn't want him there or told him to leave" (RP 266). Plaintiffs then asked a misdirected question:

Q. And did she describe his condition ***when she told him to leave?***

A. Yeah, she knew that he was tipsy, that he shouldn't be behind the wheel.

(RP 266; emphasis supplied). Kincaid's condition at the time he left was irrelevant.

Likewise, Rainy's testimony about the second conversation did not provide the needed evidence:

Q. And the second time that [Chapman] talked to you, did she again indicate what his condition was ***when he left the Moose Lodge***?

A. Yes.

* * *

Q. And what did she say in terms of his ability to operate a vehicle?

A. Drunk.

(RP 267-68; emphasis supplied). Again, her testimony did not create an issue of fact because it was directed to Kincaid's time of departure, not his time of service.

The testimony of former bouncer Lisa Johnston, who spoke to Chapman during funeral preparations for Kincaid, was also insufficient (RP 331, 335-36). Johnston testified:

Q. What did [Chapman] tell you?

A. She said that Hawkeye was sitting at the bar and he was being obnoxious and that he was drunk, and she cut him off and he got mad.

Q. And then what happened after she cut him off and he got mad?

A. He left.

Q. Did she indicate that she told him to leave?

A. Yes.

(RP 336). This testimony helps defendants, not plaintiffs. When Chapman observed Kincaid under the influence of alcohol, she stopped serving him.

Plaintiffs offered no evidence that Chapman served Kincaid when he appeared to be under the influence of alcohol. At the very least the judgment is against the manifest weight of the evidence. Defendants deserve JMOL, or alternatively, a new trial.

II.

THE COURT ABUSED ITS DISCRETION BY ALLOWING PLAINTIFFS TO USE THE DEPOSITION AND *EX PARTE* DECLARATION OF RON BEERS.

At the time of trial, Ron Beers lived in Oregon (RP 315). Over objection, the court allowed plaintiffs to read his deposition into evidence and to use his *ex parte* declaration (RP 496, 498, 500-01, 907-09; CP 958-74). Over objection, both documents were sent to the jury (RP 498). The court abused its discretion by allowing plaintiffs to use them. *Brouillet v.*

Cowles Publishing Co., 114 Wn. 2d 788, 801, 791 P.2d 526, 533 (1990) (abuse of discretion standard).

Beers' deposition did not help plaintiffs. Beers could not recall being at the lodge on the night of the accident (CP 962 at 16-17; CP 969 at 43). He had never seen anyone, including Kincaid, show signs of intoxication while Chapman was bartending (CP 965 at 28; CP 966 at 30-33; CP 968 at 40-41). As defendants noted, plaintiffs only wanted Beers' deposition to be read as evidence so they could read Beers' *ex parte* declaration (RP 316).

The Beers' declaration did not qualify as substantive evidence. By its very nature, the declaration was hearsay: an out-of-court statement offered for the truth of the matters asserted. ER 801(c). Absent an exception, it was inadmissible. ER 802. One exception is the declaration is not hearsay and may be used substantively if it was given under oath "at a trial, hearing, or other proceeding, or in a deposition." ER 801(d)(1). But the exception is inapplicable. The Beers' declaration was not given "at a trial, hearing, . . . or deposition." It was given at Beers' funeral home when plaintiffs' investigator Larry Langdale paid a surprise call on Beers (CP 961 at 10; RP 920-22). Plaintiffs offered no evidence that they gave defendants prior notice of the interview. No attorney was present to protect the interests of Beers or defendants. And no attorney was present

to protect them when the investigator paid an unannounced second visit and handwrote the addendum (CP 961 at 12-13).

The case law establishes that the Beers declaration also did not meet the "other proceeding" requirement. *Santos v Murdock*, 243 F.3d 681, 684 (2d Cir. 2001) [witness affidavit drafted by an attorney and used to oppose government's motion for summary judgment not an "other proceeding" under FRE 801(d)(1)]; *United States v. Deitrich*, 854 F.2d 1056, 1061-62 (7th Cir. 1988) [witness statement taken by secret service agents at witness' home not an "other proceeding" under FRE 801(d)(1)]. The mere fact that the procurement of Beers' declaration had been discussed at Beers' deposition did not turn the contents of the declaration into a deposition under ER 801(d)(1). This is particularly true because Beers never read the declaration and did not know whether the addendum was accurate (CP 960 at 6; CP 962 at 16-17). The declaration was not substantively admissible.

The court stated that the deposition was admitted for impeachment purposes (RP 841). Impeachment evidence is not substantive evidence. *State v. Fliehman*, 35 Wn. 2d 243, 212 P.2d 794, 795 (1949). Normally, a party may impeach any witness, even his own. ER 607. But a party may not call a witness for the primary purpose of impeaching him with

otherwise inadmissible evidence. *State v. Hancock*, 109 Wn. 2d 760, 763, 748 P.2d 611, 613 (1988):

> The underlying concern is that prosecutors may abuse the rule [ER 607] by calling a witness they know will not provide useful evidence for the primary purpose of introducing hearsay evidence against the defendant. ***This tactic seeks to exploit a jury's difficulty in making the subtle distinction between impeachment and substantive evidence.***

Id. (emphasis supplied). That is what happened here. Although Beers' declaration was inadmissible hearsay, plaintiffs read Beers' deposition so that the jury would hear the hearsay anyway.

The *ex parte* declaration was highly prejudicial to defendants. The jury wrongly heard that Kincaid drank many times while Chapman was the bartender and that he was intoxicated "a couple of times" (RP 908). It wrongly heard that "Alexis Chapman was continuing to serve alcohol to Hawkeye Kincaid when it was obvious that he was intoxicated" (RP 909). It also wrongly heard that Beers was present at the lodge on the night of the accident and that Kincaid left the lodge between 7:00-7:15 p.m. (*Id*). This was very close to the time of the accident. No other witness recalled Beers even being present at the lodge, and for that matter, neither did Beers (RP 447, 559, 1298). John Liebrant was "quite certain" that Ron Beers was not there (RP 559). So was Chapman (RP 448-49).

The court gave a modified version of defendants' limiting instruction, but it did not cure the prejudice. As modified, the instruction told the jury that it should consider the Beers' declaration "in deciding what weight and credibility to give to Mr. Beers' deposition testimony, and for no other purpose . . . " (RP 906-07). But the court deleted the most important sentence: "You may not consider the contents of the written statement as proof of the truth of the matters stated in this statement" (CP 975; RP 496, 906-07). That sentence was both accurate and necessary. It would have told the jury that it may not treat the declaration as substantive evidence. By deleting the sentence, the court erroneously allowed the jury to treat ***either*** the deposition ***or*** the declaration as truthful. As *Hancock* recognizes, jurors have "difficulty in making the subtle distinction between impeachment and substantive evidence." 109 Wn. 2d at 763, 748 P.2d at 613.

And the jury's difficult task in maintaining that distinction became even more difficult given the court's presentation of evidence to the jury. After plaintiffs' attorneys read the Beers' deposition, the court ***itself*** read the Beers' declaration (RP 907-09). Doing so gave the declaration an undeserved air of importance. The court immediately followed its reading by stating, ". . . that's the gist of that deposition. ***You may consider that as the testimony of Mr. Beers*** . . ." (RP 909; emphasis supplied). Based

on the court's statement, the jury likely believed that the Beers' declaration was substantive evidence. The court's decision to send both the deposition and declaration to the jury room made that likelihood even stronger (RP 498). Defendants deserve a new trial.

III.

THE COURT ABUSED ITS DISCRETION BY ALLOWING PLAINTIFFS TO QUESTION DEFENSE WITNESS MAC POPE IN THE JURY'S PRESENCE ABOUT DRINKING PRIOR TO TESTIFYING.

Defendants' theory was that if Kincaid was intoxicated, he became so after leaving the lodge. Defendants offered evidence that Kincaid left at approximately 6:00 p.m. (RP 438-39, 442, 1294-95, 1311, 1738). The accident occurred around 7:46 p.m., leaving much time for Kincaid to become intoxicated (RP 360). Kincaid had previously frequented the Pioneer bar in Ferndale — about seven miles north of Bellingham (RP 280, 333, 1238). The accident happened just south of Ferndale as Kincaid's vehicle was headed south toward the lodge, rather than north toward Ferndale (RP 168-69; 1373-74).

A crucial defense witness was Mac Pope, who had known Kincaid for years (RP 1237). Pope worked in Ferndale (RP 1238). Following work, Pope and friend Robert Zoerb went to a bowling alley in Ferndale, where they saw Kincaid with a beer (RP 1240-41). By car, the bowling

alley was about two minutes from the accident scene and 14-17 minutes from the lodge (RP 919-20). Pope left the bowling alley between 7:15-7:30 p.m., and Kincaid was still there (RP 1242). At the start of re-cross examination and over objection, the court allowed plaintiffs to question Pope in the jury's presence about drinking prior to testifying (RP 1262-63, 1355; CP 845-48). The court abused its discretion. *Brouillet,* 114 Wn. 2d at 801, 791 P.2d at 533.

A witness is incompetent to testify if "intoxicated" when he takes the stand. RCW 5.60.050(1). A determination of competency is for the trial judge. *State v. C.J.*, 148 Wn. 2d 672, 682, 63 P.3d 765, 770 (2003). "The jury has nothing to do with that problem." *State v. Marks*, 71 Wn. 2d 295, 427 P.2d 1008, 1010 (1967). If a court detects manifest signs of incompetency, it must *sua sponte* inquire into the witness' competency. *State v. Watkins*, 71 Wn. App. 164, 173, 857 P.2 300, 305 (1993). Here, the court became aware prior to Pope's testimony that he suffered from an alcohol abuse problem (RP 1231-32). The court believed that it smelled alcohol on Pope "when [Pope] sat down" to testify (RP 1355). Those signs should have triggered an immediate in-chambers hearing as to Pope's competency.

The court allowed plaintiffs to ask questions about drinking on the ground that the ability to correctly testify bore on Pope's credibility (RP

1355; CP 840). The court confused competency and credibility. A witness is competent if he "underst[ands] the nature of an oath and [is] capable of giving a correct account of what [he] has seen and heard." *McCutcheon v. Brownfield*, 2 Wn. App. 348, 467 P.2d 868, 873 (1970). If not, credibility concerns are moot. The witness is not competent to testify further, and any testimony already given must be stricken.

The court's reliance on notions of credibility was also misplaced because there is no medical evidence or legal authority that someone who drinks alcohol is not credible. The court erroneously allowed the jury to treat Pope as unworthy of belief if he had taken a drink. That is not the law, nor should it be. *State v. Dault*, 19 Wn. App. 709, 719-20, 578 P.2d 43, 49 (1978) (evidence of drug use inadmissible to show lack of veracity without medical or scientific proof associating that drug with a general lack of veracity). Evidence of drinking is inadmissible and prejudicial unless connected to evidence of intoxication. *E.g.*, *Sullivan-Coughlin v. Palos Country Club, Inc.*, 349 Ill. App. 3d 553, 812 N.E.2d 496, 503 (2004); *Ostrander v. Alliance Corp.*, 181 Or. App. 283, 45 P.3d 1031, 1036 (2003); *Chicchi v. Southeastern Pennsylvania Transportation Authority*, 727 A.2d 604, 607 (Pa. Cmwlth. 1999); *Hemming v. Hutchinson*, 221 Va. 1143, 277 S.E.2d 230, 232 (1981). By allowing

questions about drinking without any corresponding proof of intoxication, the court sorely prejudiced defendants.

The court's treatment of the issue put defendants in a no-win situation. Only intoxication, not drinking, disqualifies a witness, and the witness' opponent bears the burden of proof. *Watkins*, 71 Wn. App. at 169, 857 P.2d at 303. Plaintiffs offered no evidence that Pope showed signs of intoxication. But by allowing questioning in the jury's presence, the court effectively imposed a burden on defendant to disprove both drinking and intoxication. Plaintiffs' attorney stated: "It seems like there's alcohol on your breath?" (RP 1263). That statement was more like evidence than a question. Pope could deny drinking, but he could not deny that the attorney claimed that he smelled alcohol. So defendants needed evidence to rebut it. But what could they do — halt the trial and obtain a breathalyzer analysis or a blood sample? Defendants had no way of protecting Pope or themselves from an unfair accusation.

And what if Pope had something to drink that morning but was too embarrassed or afraid to admit it? He had a history of alcohol abuse problems, and he still may have suffered from them (RP 1231-32). That did not automatically make him a liar or someone unable to correctly testify. But questioning Pope in the jury's presence may have created a tremendous temptation for Pope to lie so that he could conceal his

personal demon. After all, Pope did not know where the questions would lead. Cross-examination is not an excuse to "degrade, humiliate, or disgrace the witness in order to discredit him and create prejudice against him in the eyes of the jury." *Glazer v. Adams*, 64 Wn. 2d 144, 149, 391 P.2d 195, 199 (1964). Public questioning about drinking would do just that. The temptation to lie may have been just too much for Pope to overcome. If the jury concluded that Pope was lying, it would have unfairly taken that lie out on defendants. They called Pope to the stand.

The court's handling of the problem was prejudicial in another way. The court believed that two of the jurors could probably smell the alcohol on Pope, and so if he denied drinking, they would know he was lying (RP 1355). Evidence should not be placed in the hands of only two jurors. If evidence is not simultaneously made available to all jurors, it should be made available to none. The court erroneously allowed two jurors to control the discussion about Pope because they were the ones in position to smell alcohol.

Plaintiffs' timing in raising the issue creates the reasonable inference that they intended to prejudice defendants. During closing argument, plaintiffs' counsel stated over objection: "I'm pretty confident that I'm not the only person in this courtroom that detected alcohol on Mac Pope's breath ***at 9:00 in the morning***" (RP 1885-86; emphasis

supplied). That was the start of the day's jury proceedings. Yet plaintiffs waited until defendants completed their ***re-direct*** examination before bringing the issue to the court (RP 1263). That allowed plaintiffs to leave a lasting prejudicial impression about Pope. And plaintiffs made sure to leave it. When Pope had denied drinking, counsel stated: "It seems like there's alcohol on your breath?" (CP 1263).

Defendants were severely prejudiced by the questioning of Pope. Contrary to the court's post-trial explanation, Pope's testimony did not play a "minor role" (CP 840). Pope was a key defense witness because he placed Kincaid in a Ferndale bar long after he left the lodge and miles from it. Moreover, the court wrongly tried to minimize the impeachment by stating that Pope's memory had been impeached by other questioning (*Id*). Other questioning may have caused the jury to disregard Pope's testimony in limited areas. The questioning about drinking would have caused the jury to disregard it entirely.

The prejudice was particularly bad given the nature of the case. Three people were seriously injured by an allegedly over-served driver. Plaintiffs' improper questioning made it look as if defendant responded by calling a witness who could not stay away from a bottle for a morning. That is basically what plaintiffs told the jury in closing argument (RP

1885-86). The court refused to strike the argument because the jury heard questions about it (RP 1894). One wrong ruling begat another.

The questioning of Mac Pope about drinking likely inflamed the jury and resulted in findings of liability and excess damages. A new trial is warranted.

IV.

THE COURT ABUSED ITS DISCRETION BY ALLOWING PLAINTIFFS TO OFFER INADMISSIBLE EVIDENCE UNFAIRLY IMPUGNING DEFENDANTS' INTEGRITY AND CREDIBILITY.

Plaintiffs' case had a huge hole. Kincaid was miles away from the lodge and driving toward it at the time of the accident. Witnesses saw him leave the lodge around 6:00 p.m., almost two hours before the accident. Other witnesses placed him in a Ferndale bar as close as fifteen minutes before the accident. Before trial started, plaintiffs knew that the lodge witnesses would not provide evidence of over-service. So plaintiffs called those witnesses in an effort to establish that they conspired to remain silent, even to outright lie, to protect defendants (RP 1869-80). Plaintiffs twisted lodge traditions. They accused defendants and their attorneys of manipulating discovery. Plaintiffs did it all in the jury's presence. By allowing these attacks to occur, the court abused its discretion. *Brouillet*, 114 Wn. 2d at 801, 791 P.2d at 533.

"The Moose" is a fraternal service organization composed of under 2,000 local lodges (RP 1014-16). It traces its roots to 1883. 13 *World Book 2001* at 799 (World Book, Inc. 2001). Not unexpectedly, its membership traditions, things like initiation ceremonies, dress, and fraternal oaths, go back as far. For some people, such traditions — and the organizations from which they come — are outdated albeit harmless relics of a by-gone era. Like many private service clubs, The Moose has suffered a decline in membership (RP 593, 1015-16). For other people, traditions like those maintained within The Moose carry a more sinister meaning. They are symbols not of a private club, but of a secret sect. Such an attitude is a form of social prejudice, often a subconscious one, against good people doing good things in their own ways.

That is the prejudice on which plaintiffs' attacks preyed. Plaintiffs' conspiracy-to-lie theory had a basic weakness. Plaintiffs had no secret letter, memo, e-mail, meeting, or conversation to evidence the alleged "shroud of silence" (RP 1877). Plaintiffs had no whistleblower to testify to the so-called "pointed effort by members" to "stop the flow of information" (RP 1869, 1871). Plaintiffs only had a bunch of decent people from a decent organization who saw and heard nothing to support plaintiffs' claim. Plaintiffs could not even argue that the lodge members testified consistently to the details of the evening. So plaintiffs asked

them about Moose symbols and fraternal oaths (RP 526-28, 591). They asked whether the Moose is a "sacred organization" (RP 1285). Plaintiffs wanted the jury to know that members call each other "Brother" (RP 593). None of this evidence was relevant to claims of over-service and negligent supervision.

And over objection, plaintiffs asked John Liebrant whether applicants become members at a "ritualistic altar" (RP 535). Plaintiffs continued to question Liebrant about "certain garb . . . certain attire, like robes and things of that nature" (RP 536). The questions had no other purpose than to dirty defendants in the jury's eyes. The phrase "ritualistic altar" conjures images of blood sacrifices, of places like Jonestown with its mass murder/suicide of roughly 1,000 people. The reference to robes recalls images of the KKK. Liebrant responded to plaintiffs' questioning by stating: "We don't wear white hoods, if that's what you're getting at" (RP 536). Plaintiffs were "getting at" the prejudicial suggestion that private clubs are private so that they can hide their dirty little secrets. In closing argument, plaintiffs specifically mentioned the "secret and sacred doors of this Moose Lodge" and spoke of the "fraternal oaths" taken to protect "the circle, loyal companion, sacred organization" (RP 1869, 1870). Lacking evidence of a conspiracy, plaintiffs fomented feelings of prejudice.

The court should not have allowed it. Evidence is unfairly prejudicial when offered to trigger an emotional rather than rational response. *Hayes v. Weiber Enterprises, Inc.*, 105 Wn. App. 611, 618, 20 P.3d 496, 499 (2001). Conduct injecting racial, ethnic, and religious prejudice is reversible even without objection. *Tierco Maryland, Inc. v. Williams*, 849 A.2d 504 (Md. 2004) (new trial where inappropriate suggestions of racial motivation introduced by plaintiff's counsel); *United States v. Nose*, 903 F.2d 16, 24-29 (D.C. Cir. 1990) (prosecutorial remarks kindling racial or ethnic predilections "can drastically affect a juror's impartiality"). Preying on jurors' social biases should be no less impermissible.

To further their conspiracy theory, plaintiffs also unfairly attacked the honesty of defendants and their counsel in complying with discovery. Plaintiffs had requested information about defendants' entire membership list (CP 1830-34). Defendants opposed the request as overly broad and intrusive (CP 1818-23). A discovery judge granted plaintiffs limited relief (CP 1777-78). After a further dispute arose, plaintiffs filed a second motion to which defendants again objected (CP 1772-76; 1737-59). The same discovery judge ordered defendants to produce a list by August 15, 2005, and defendants did so (CP 891-92). Plaintiffs did not file any further motions to produce, nor did they seek an extension of time to talk

to potential witnesses. The matter should have been closed. Indeed, the trial court even recognized through an *in limine* ruling that pre-trial motions should not be raised in front of the jury (RP 73: 9/26/05).

But during cross-examination of administrator Glenn Strode, plaintiffs asked over objection:

> [W]hy is it that you never provided that [list] to us when we requested it?
>
> * * *
>
> Did you ever voluntarily turn that over to the Plaintiffs ever?
>
> * * *
>
> Was that pursuant to a court order where the court had to order it to be turned over?

(RP 1653-54). When plaintiffs learned that Strode had given a list to defense counsel, they asked over objection whether the list contained phone numbers (RP 1655). When Strode said that it did, plaintiffs' attorney stated: "I can tell you that the list we got did not contain --" (RP 1655). Although the court stopped plaintiffs from describing their list, it allowed plaintiffs to ask Strode whether he had taken telephone numbers off the list (*Id*). At no time did plaintiffs show Strode any list.

The questioning was highly improper. The discovery dispute raised a legal question about the propriety of plaintiffs' requests. That question was for the judge, not the jury — and for good reason. A jury is

not trained to understand the nuances of the law and so can easily misconstrue the purpose of an objection. That is why the law has always forbidden attorneys from commenting in the jury's presence on court rulings. *Hanstad v. Canadian Pacific Ry.*, 44 Wn. 505, 510-12, 87 P. 832, 834-35 (1906). The Court of Appeals correctly recognizes that when a party comments on issues that a jury should not decide, a real and substantial danger of prejudice exists. *Loeffelholz v. Citizens For Leaders With Ethics And Accountability Now*, 119 Wn. App. 665, 708-09, 82 P.3d 1199, 1222 (2004) (upholding refusal to allow closing argument comment on a dismissal of a claim).

Here, a discovery judge resolved a discovery dispute by ordering production of the lodge's membership list (CP 891-92). Following its production, plaintiffs neither complained to the court that the list was defective nor sought more time to contact listed members. Instead, plaintiffs improperly brought the matter to the jury, with the trial court's permission. There, plaintiffs raise questions about defendants' willingness to produce the list and even suggested that defense counsel removed information from it (RP 1654-55). Actually, administrator Glenn Strode had stated in a discovery affidavit that the original list did not contain a large percentage of phone numbers (CP 1754-56).

If plaintiffs believe that they had been short-changed, they should have complained to the court. And the court should have taken the dispute inside, not given it to the jury. The court unfairly allowed the jury to use a legal dispute to conclude that defendants and their attorneys conspired to lie. That prejudice was cemented by plaintiffs' closing argument:

> Now, having been met with such resistance trying to find out who was there that night, we finally formally requested a complete copy of their membership list, which you heard Mr. Strode say it's easy. It's available. It's on a computer. They just print it off. Big surprise. They wouldn't turn it over. We only got it when the Court ordered them to turn it over, and unfortunately, we didn't get it --
>
> * * *
>
> Unfortunately, we didn't get it until just a couple months ago, five years after the accident (RP 1874-75).

The court's post-trial explanations cannot save its rulings. The court stated that the transcript does not refer to the KKK and that Liebrant himself mentioned "white hoods" (CP 842). The court ignored defendants' larger point that plaintiffs' questioning unfairly allowed plaintiffs to portray defendants as a secretive cult bent on lying (CP 1066-68). Although a party may suggest that opposing witnesses are incredible, it may not do so by resorts to prejudice. As for Liebrant's comment about white hoods, it naturally followed from plaintiffs' question about "certain garb . . . certain attire, like robes and things of that nature" (RP 536). And just seconds earlier plaintiffs had asked about a "ritualistic altar" (RP 535).

The court also stated the defendants "present no evidence to show that the jury decision was somehow tainted in this way" (CP 842). The court's answer would make all verdicts irreversible, because a party cannot offer evidence of jury deliberations. The evidence of liability was paper-thin at best. Even the trial court recognized how little liability evidence existed (RP 1840; CP 840). The finding of liability coupled with the excessive damage awards establishes prejudice.

As for the questioning about the discovery dispute, the court stated that the inquiry was "minor and merely cumulative to the other testimony [as to credibility]" (CP 842). A suggestion that a party withheld, then doctored, a witness list is neither minor nor cumulative, particularly when plaintiffs offered no evidence of a conspiracy to lie. The court stated that the questioning was relevant to "the lodge members' credibility and motives" (*Id*). But the only lodge member involved with the list was Glenn Strode. The court's overly-broad imputation of blame to other witnesses shows just how easily the jury would have done the same. Besides, plaintiffs' suggestions of dishonesty were also directed to defense counsel. They are the ones who supposedly removed the telephone numbers from the list. By allowing plaintiffs to impugn the credibility of defense counsel, the court unfairly allowed the jury to disbelieve defense counsel's entire presentation.

Defendants are entitled to a new trial on liability and damages.

V.

THE COURT ERRED IN INSTRUCTING THE JURY AS TO EVIDENCE OF KINCAID'S BLOOD ALCOHOL CONTENT AND AS TO CIRCUMSTANTIAL EVIDENCE.

Over objection, the court gave its instruction 13 stating that neither the amount of alcohol consumed nor evidence of Kincaid's blood alcohol level "is sufficient by itself" to establish over-service (CP 1121; A.1). Defendants requested a more specific instruction stating that the jury may not consider Kincaid's blood alcohol content in determining whether Kincaid was apparently under the influence at the time of service (CP 1138; A.1). Defendants' instruction would have told the jury to disregard all evidence of Kincaid's blood alcohol content (*Id*). The court erred by refusing to give defendants' instruction. *Thompson v. King Feed and Nutrition Service, Inc.*, 153 Wn. 2d 447, 453, 105 P.3d 378, 380 (2005) (*de novo* review standard).

As discussed at Argument I, BAC evidence is inadmissible to prove that at the time of service, a patron was under the influence of alcohol. *Purchase* 108 Wn. 2d at 226, 737 P.2d at 665. Defendants' instruction was particularly necessary because the court also erroneously instructed the jury that it could base its verdict on circumstantial evidence

(CP 1111; RP 1839-40, 1841; A.1). Defendants' instructions on a blood alcohol evidence and on circumstantial evidence properly reflected the law applicable to over-service claims (CP 1138, 1142; A.1, 2). The court erred by refusing them.

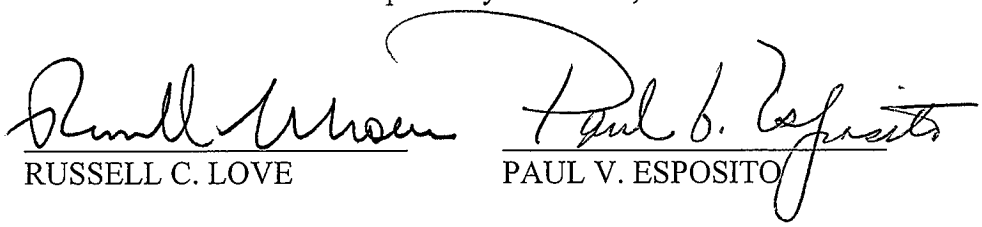
CONCLUSION

The problem of drinking and driving is very serious. It is also a problem about which passions are quickly stirred and over which trials can easily become hunting grounds for alcohol servers. The New Jersey Superior Court's reversal of an approximately $110 million judgment against beer sellers based on trial errors is a recent example. *Verni v. Harry M. Stevens, Inc.*, 387 N.J. Super. 160, 903 A.2d 475 (2006). Here, the evidence against defendants was razor-thin, if it was evidence at all. In a case like this, trial errors can have a decidedly negative effect on a owner's right to a fair trial. The errors did so here.

For the foregoing reasons, defendants-appellants Bellingham Lodge #493, Loyal Order of Moose, Inc. and Alexis Chapman urge this Court to reverse the orders entered on November 4, 2005 and January 11, 2006, and to enter judgment for defendants-appellants, or in the

alternative, to remand this case to the superior court for a new trial on all issues, and for such other relief as this Court deems just.

Respectfully submitted,



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APPENDIX

Instruction No. 3

The evidence that has been presented to you may be either direct or circumstantial. The term "direct evidence" refers to evidence that is given by a witness who has directly perceived something at issue in this case. The term "circumstantial evidence" refers to evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in this case.

The law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case. One is not necessarily more or less valuable than the other.

(CP 1111).

Instruction No. 13

Whether a person was apparently intoxicated or not is to be determined by the person's appearance to others at the time the alcohol was served to the person. Neither evidence of the amount of alcohol consumed, nor evidence of the person's blood alcohol level, is sufficient by itself to establish that the person was served alcohol while apparently under the influence.

(CP 1121).

Defendants' Proposed Instruction No. 36

You may not consider any evidence of Hawkeye Kincaid's blood alcohol content (BAC) in deciding whether Hawkeye Kincaid was apparently under the influence of alcohol when Alexis Chapman served him alcohol on April 21, 2000. This means you must disregard all evidence of Hawkeye Kincaid's blood alcohol content, including evidence from medical records, the autopsy, and the opinions of Richard Saferstein and Michael Hlastala.

(CP 1138).

Defendants' Proposed Instruction No. 39

The evidence that has been presented to you may be either direct or circumstantial. The term "direct evidence" refers to evidence that is given by a witness who has directly perceived something at issue in this case. The term "circumstantial evidence" refers to evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in this case.

Unless you are instructed otherwise, the law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case. One is not necessarily more or less valuable than the other.

(CP 1142).

DECLARATION OF SERVICE

On said day below I deposited in the United States mail a true and accurate copy of the following document: Brief of Defendants-Appellants Bellingham Lodge #493, Loyal Order of Moose, Inc. and Alexis Chapman, No. 57821-9-I, to the following:

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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

Dated this 13th day of November, 2006 at Chicago, IL

Manish Shah

Manish Shah